

## Military Occupation: Legally Ensuring a Lasting Peace

The military occupation model, under which victorious belligerents occupy the territory of a defeated country and administer it for a period of time before turning power over to a successor government, is a viable and legal instrument of statecraft. It will remain so as long as war continues to be an accepted norm of international conduct. Indeed, rather than making military occupation illegal, international law prescribes the conditions under which military occupation should occur and regulates the way in which such an occupation should be carried out. Certain circumstances on the ground might lead policymakers not to adopt or pursue a lengthy military occupation or even a relatively short one, but policy imperatives always drive this choice; it is not a matter of law. Working within the parameters of a legal military occupation, an occupying power(s) can institute needed structural economic and democratic reforms to ensure a lasting peace with its adversary and restore international stability.

Significantly, the law of military occupation is an integral part of the law of armed conflict and is based on several multilateral conventions as well as centuries-old customary international law norms. Together with the rules governing when and how military force can be used, the rights and obligations of a belligerent occupier are carefully balanced to help inculcate a more responsible attitude toward the use of force. The decision to go to war should not be taken lightly, at least in part because being a victor and administering the territory of a defeated enemy triggers an awesome set of responsibilities.

Often-invoked arguments that modern international law bars military occupation are either misinformed about historical precedent and doctrine or,

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more likely, are being employed to oppose a war for other reasons. This was clearly the case during the prelude to war in Iraq as many U.S. allies and most U.S. adversaries made a concerted effort to limit U.S. freedom to use force, arguing that, without the United Nations Security Council's explicit blessing, international law bars the United States from resorting to force unilaterally or even multilaterally. A similar set of legalistic arguments, setting forth unrealistic expectations about the legal rules applicable in combat,

**Military occupation is, and will remain, a viable and legal instrument of statecraft.**

such as the permissible extent of collateral damage and the obligation to commence humanitarian relief operations promptly, was employed by war opponents while the combat operations in Iraq unfolded. Now, having effected the regime change in Iraq, the United States and its coalition partners face yet another specious set of legal arguments, threatening to impede or even vitiate entirely their legal rights to administer Iraq as belligerent occupiers.

The current case of Iraq and the rights and obligations of the United States and coalition forces as occupying powers following the defeat of Saddam Hussein's regime illustrates the broader issues associated with military occupation as a means of accomplishing regime change. Even today, however, this is not the only relevant case. Postconflict reconstruction and nation building is still underway in Afghanistan, and the concepts undoubtedly come into play when considering Israel's status as an occupying power in Gaza and the West Bank. In light of the new threat of weapons of mass destruction (WMD) and the increased need to take preemptive action against rogue states threatening to use them, the rights and obligations of an occupying power are likely to be at issue more now and in the future than they have been for half a century.

## **Weighing the Options**

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Although the regime change in Iraq has been effected by coalition forces, many issues relating to how post-Saddam Iraq will be governed remain unresolved, including the precise roles to be played by the United States and its coalition partners and other countries, as well as the European Union and the UN. The only model that is not under consideration in Iraq is the notion that, once the U.S.-led coalition deposed Saddam's regime, everybody would simply go home. All serious stakeholders have come to realize that, if Iraq is to be prevented from posing a future threat to regional and interna-

tional security, the United States, other coalition members, and international organizations will have to play a long-term role in rebuilding and restructuring that country. The administration's oft-articulated goals of fostering democracy in Iraq and facilitating other democratic transitions in the Arab world also require a sustained engagement on the ground.

The realization that a difficult set of issues surrounding Iraq's political and economic transformation will have to be addressed by the coalition countries has prompted significant debate both within the administration and in broader circles. In the last several months, some administration officials have proposed instituting a military occupation government much like those that emerged in Germany and Japan after World War II. Other arguments call for a prompt transition of authority to a successor administration, à la Afghanistan, with the government most likely composed of a coalition of Iraqi dissidents, religious and civic leaders, and possibly some junior civil servants and local and regional government officials who are not too closely aligned with Saddam's clique. Another argument, advanced by most U.S. allies and numerous nongovernmental organizations (NGOs), favors postwar governance of Iraq driven by the Security Council.

The military occupation model provides the United States and its coalition partners with the greatest flexibility to implement durable changes to Iraq's political and economic structure. In contrast, the UN's track record in rebuilding war-torn societies is unimpressive; its legal right to govern postwar Iraq is uncertain; and the ability of an Iraqi successor administration to be constructed quickly and to run the vast bureaucracy of the government is low.

## **The Policy Debate**

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Legal issues aside, the policy merits of the occupation option have not drawn widespread acclamation. Most U.S. European allies, for example, have expressed a strong preference for a UN-led, post-Saddam Iraq. Not surprisingly, virtually all Iraqi dissidents also oppose military occupation, particularly the Kurds, who for many years have been enjoying de facto independence. To be clear, there is no apparent international opposition (with the possible exception of France and Russia) to a relatively short—measured in months—U.S. and British military occupation. Most realize that some form of military rule will be needed to tackle such urgent tasks as completing the eradication of Iraq's WMD; ending all military opposition from the remnants of the old regime, including suppressing any large-scale guerrilla activities; and launching needed humanitarian relief and reconstruction operations. There is also consensus that any protracted U.S. and British military occupation would be both undesirable and unnecessary. Thus, the debate about military occupa-

tion really focuses on the pros and cons of any type of midterm occupation, lasting from 10 months up to 2–3 years.

In the United States, many in the media and in Congress, despite their oft-expressed desire to build democracy in post-Saddam Iraq, have been quite skeptical about the benefits to the long-term development of Iraq that could be set in motion by a military occupation. Support for this option has not been universal even within the administration. In addition to debate among political appointees, some army officers are concerned that the military occupation duties might tie up 45,000–60,000 U.S. troops (the low-end estimate by the Joint Chiefs of Staff) or as many as 250,000 U.S. troops (the high-end estimate furnished by the army's chief of staff, Gen. Eric Shinseki), with the army providing the bulk of the manpower. The army's fear is that major resource commitments will constrain the ability of the United States to operate elsewhere in the world and that an Iraq occupation-related mission will be tough, unglamorous, and potentially career threatening for senior army officers.

The major reason for opposition within the United States, however, is the belief that a military occupation government led by U.S. forces would greatly inflame Arab and Muslim hostility. These arguments are not unreasonable, but ultimately, they appear wanting. It would be difficult for even the most biased Arab media to condemn a well-run military government, in which the United States shared responsibility with other countries and rapidly improved Iraq's economic and civil affairs, particularly if Iraqi people were demonstrably managing local affairs and the arrangement was helping to promote good relations among the various ethnic groups in Iraq.

Moreover, the military occupation model offers two immediate diplomatic benefits for the United States. First, it could help the United States build and maintain a broader post-Saddam coalition because joining such a coalition would be a legal prerequisite to participation in the occupation government, as was the case in post-World War II Germany. This factor was particularly influential in shaping the thinking of several key Arab leaders about the war in Iraq. Once they realized that the U.S. military campaign against Saddam was inevitable, their interest in having a meaningful role in postwar Iraq became an important policy driver. Shortly before the bombing began, Saudi Arabia's ambassador to the United States, Prince Bandar bin Sultan, was quoted as saying that, "once we join the club [the anti-Saddam coalition], then we can negotiate what Iraq will be like after the war. But, without being a part of the club, then we have no role in the day after."<sup>1</sup>

In addition, even though the intense French opposition—a position backed by Russia and China—to the use of U.S. military power in Iraq prevented the Bush administration from getting the Security Council to pass yet an-

other use-of-force authorizing resolution, the military occupation model may well offer some important UN-related diplomatic benefits in the future. Specifically, the administration may find it easier to procure a new Security Council resolution confirming U.S. occupation rights and obligations in Iraq if support for such a resolution becomes the benchmark for involvement in postwar Iraq.

Obtaining the UN imprimatur for a military occupation of Iraq is likely to be a difficult process with an uncertain outcome. Precisely because they realize the diplomatic, economic, and political leverage that comes with militarily occupying a territory, the French have already indicated that they would veto any Security Council resolution that would confirm the U.S. and British belligerent occupation rights in postwar Iraq. It remains to be seen whether France's diplomatic obstructionism after the war will prove as successful as its prewar efforts.

Unfortunately, the prospects for a broad accord between the United States and all of its traditional allies are not promising because the efforts of France, Belgium, and a few other members of "old" Europe have permutated beyond just occupation-related matters in an effort to limit U.S. freedom to use force. In addition to such *jus ad bellum* doctrinal musings, efforts have been made to constrain the way in which the United States can use force legitimately once the fighting starts. Such *jus in bello* doctrinal innovations deal with matters such as the extent of permissible collateral damage, targeting individual commanders as distinct from attacking enemy troops en masse, engaging dual-use targets (e.g., bridges and power stations), and a host of other combat-related issues. The overall underlying goal is to complicate U.S. efforts to practice its customary and successful way of war, which emphasizes speed and massive yet discriminate use of firepower.

Not satisfied with advancing a set of policy arguments concerning the combination of the *jus ad bellum* and *jus in bello* issues, parallel efforts have been undertaken to assert, also allegedly as a matter of law, that a military occupation model or any efforts to change the political make-up of the defeated country in the aftermath of war are proscribed. Shortly after the war against Iraq began, France and Russia demonstrated their intent to make the U.S.-led military occupation of Iraq as burdensome as possible, with the Russian envoy to the UN asserting—contrary to the entire set of international law bearing on occupying powers' rights and obligations—

**Administering a defeated enemy's territory triggers an awesome set of responsibilities.**

that occupying belligerents must “make reparations for the damages caused in the conflict.”

Here again, policy arguments masquerade as law. If one were to assume the illegality of effecting a regime change in Iraq, this would vitiate all reasons for commencing the war. Having been presented with decades of repression and aggressive conduct by Saddam’s regime and his defiance of various Security Council resolutions for years, the notion that all coalition forces could have done would be to disarm his regime and then withdraw is absurd on its face. Indeed, all of the doctrinal innovations related to the laws of armed conflict, even if followed in their somewhat milder version,

would greatly complicate U.S. recourse to force, both against Iraq and in other conflict scenarios for the foreseeable future. In their most extreme version, these doctrinal innovations would permanently leash the U.S. use of force.

In any event, the military occupation model is both legal and useful and, although not a panacea, makes it easier for the United States to handle the daunting political, economic, and security challenges it faces in post-Saddam Iraq. As the problems encountered in Afghanistan demonstrate, once power is transferred to a successor regime, the U.S. government’s ability to influence the new regime’s policies and push it to make difficult policy choices becomes quite constrained. For example, despite otherwise exemplary cooperation with the United States, President Hamid Karzai has been quite reluctant to move against his country’s recalcitrant regional warlords.

Meanwhile, the Security Council–driven governance model is certain to be plagued by numerous disagreements among council members, pitting the United States and Great Britain against France, Russia, and China. There is already ample evidence that disputes among the permanent Security Council members are alive and well and likely to be just as contentious in the postwar period as were the prewar debates about authorizing the use of force. Moreover, the track record of UN-controlled postconflict operations demonstrates a very low level of basic managerial competence. More than four years into the UN tenure in Kosovo, electric service in Pristina has yet to be fully restored.<sup>2</sup> On the other hand, having U.S. and coalition forces retain the levers of power, while delegating responsibilities for local and regional governance to the indigenous Iraqi leaders and Iraqi dissidents, would avoid the problems (such as inexperience with running a large-scale bureaucracy to meet the needs of the entire Iraqi population) associated with other options and enable the United States to pursue an ambitious set of economic and political reforms.

**We have policy arguments masquerading as law.**

There is also no reason to believe that military occupation will demand a great deal of U.S. and British human resources. Just as the United States can wage war by drawing on both high-quality U.S. troops and indigenous military forces (as was the case in Afghanistan), it certainly can augment its occupation forces with Iraqi military and civilian personnel. This situation is similar to post–World War II Germany and Japan, where U.S. occupation authorities were able to utilize the services of thousands of German and Japanese nationals who functioned as interpreters, advisers, police officers, mayors, and civil servants.

Nor does the occupation model require U.S. and British authorities to be responsible, even during the early stages, for all aspects of Iraq’s governance. Indeed, it is both feasible and desirable to transfer the control of at least some national-level ministries to Iraqi officials very quickly. Furthermore, depending on the progress made, Iraqi officials can also assume many local and regional government functions. Using this approach, the military occupation authorities would retain control over areas dealing only with security, key political issues, and economic matters. This entire arrangement and the pace of the eventual transition would be very flexible and responsive to the developments on the ground in any similar situation.

### **Lessons from Germany and Japan**

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Immediate benefits aside, the military occupation paradigm—appropriately revised to accommodate some trends in post–World War II international law and the unique circumstances of Iraq—arguably offers the best opportunity for the United States to effect sorely needed long-term positive political and economic changes in both Iraq and the Persian Gulf region. The lessons of the German and the Japanese occupations are quite instructive for U.S. involvement in postwar Iraq; both were tremendous successes at transforming aggressors with war-ravaged economies into productive, free societies, and both defied contemporary skeptics.

Clearly, there are differences between Iraq in 2003 and Japan and Germany in 1945. On one hand, Iraq presents the difficulties of factionalism. On the other hand, Germany and Japan had devastated economies after their defeat, while Iraq—given the precise targeting employed by coalition forces—has much of its infrastructure and economy intact. Thus, although Iraq is indeed a new and different case, these differences are both positive and negative, and the overall level of success of a military occupation in Iraq might well be, on balance, very similar to that achieved in Japan and Germany.

In the case of Germany, the Allied powers, having accepted Germany’s unconditional surrender, became the country’s effective rulers for several

## The UN Charter does not bar military occupation for regime change.

years. Supreme Allied Commander Gen. Dwight D. Eisenhower was vested with vast rights and obligations in his role on the Allied Control Council: “You are, by virtue of your position, clothed with supreme legislative, executive, and judicial authority in the areas occupied by forces under your command. This authority will be broadly construed and includes authority to take all measures deemed by you necessary, appropriate or desirable in relation

to military exigencies and the objectives of a firm military government.”<sup>3</sup> Although the victorious Allies legally would have been justified in legislating as the sovereign government of Germany, they chose not to do so; instead, they proffered a package of reforms that were enacted by the German government once it was vested with appropriate legislative powers. The primary goal of the occupation was:

[to] prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany’s capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.<sup>4</sup>

The military government, which was directed to demilitarize Germany, engaged in a broad denazification program. This policy was applied statewide, with the exception of the Soviet-controlled zone, which slipped behind the Iron Curtain. As a result of the Allies’ efforts, the entire political, legal, and educational system of West Germany was reformed. Allied-run military commissions arrested and prosecuted hundreds of war criminals. The military occupation was basically over by 1949, and Germany promptly rejoined the family of democratic nations, becoming a full-fledged member of NATO and a key player in the new postwar Europe.

In the case of Japan, its postwar government retained sovereign power, at least formally. In the 1945 Instrument of Surrender, however, Japan conceded a number of key prerogatives to the Allied powers, including the right to punish war criminals. (Unlike the case of Germany, the United States was the only foreign power to govern Japan. The Far East Commission, comprising the 11 Allied powers, failed to be an effective organization because of Cold War–related tensions among the members.) Given the daunting task of running Japan through military occupation, however, the United States decided to act largely through the existing Japanese government structures. Emperor Hirohito retained his title, although his role became symbolic rather than substantive. Accordingly, Japan agreed to “comply with all re-

quirements which may be imposed by the Supreme Commander for the Allied Powers, or by agencies of the Japanese Government at his direction.”<sup>55</sup>

Over the course of his six-year rule of occupied Japan, Gen. Douglas MacArthur rewrote the country’s laws, including its constitution; revised school textbooks; and attempted to break the grip of the monopolistic *zaibatsu* on the Japanese economy. Through the newly formed Japanese legislature, the Diet, MacArthur implemented the Deconcentration Law in 1947, which made great strides toward weakening the centralized control of industries. MacArthur enacted major land reforms and expanded civil rights, particularly for women. Articles 13 and 19 of Japan’s new constitution provided a progressive statement on human rights in its prohibition of discrimination on the basis of race, sex, social status, creed, or family origin. When the general had accomplished the many reforms, the United States and Japan signed a formal peace treaty—the Treaty of San Francisco—in September 1951. After the treaty took effect on April 28, 1952, Japan again assumed full sovereignty. The military occupation of Japan enabled the United States to implement reforms to ensure a lasting peace with Japan—reforms designed not to gain an economic advantage from victory but to improve the political and economic landscape of that country.

## The Legal Debate

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Centuries-old norms of customary international law, which permitted occupying powers to wield the totality of sovereign powers that had formerly been vested in the defeated governments, guided the victorious Allies’ rule of Germany and Japan. Since then, to note but one key change, the UN Charter has come into force, with Article 2.4 indicating that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Construed literally, this admonition would bar any efforts, for example, to effect a regime change in a foreign country. Indeed, many opponents of intervention in Iraq—whether for the purpose of effecting an immediate regime change or to institute an interim military government—rely on this article blindly, without considering its context within the UN Charter in particular or within the whole of international law.

The literal reading of Article 2 also can be plausibly supported by Article 107 of the charter, which specifically exempts from the charter’s reach any actions taken against the former Axis powers. The implication here is that the Allied occupation of Germany and Japan might have departed from the charter’s strictures but that the charter’s prescriptions only looked forward. This interpretation of Article 2, however, even when buttressed by Article

107, would vitiate the entire venerable law of military occupation. It would also run counter to Article 51, which indicates that “nothing in the present charter shall impair the inherent right of individual or collective self-defense.” Indeed, the literal reading of Article 2 would prevent victims of even repeated aggression from doing anything more than liberating their own territory and would certainly bar such victims or their allies from taking the war to the

aggressor.

Given the entire experience of World War II, which provided the formative basis for the UN system, this interpretation of the UN Charter is most implausible. The more reasonable interpretation of Article 2 is that it prohibits states, even when exercising the right of self-defense, from dismembering or absorbing an enemy state,

but it does not bar or impair the right to engage in a military occupation to change the regime of that state.

The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War supports this contextual interpretation of Article 2. A literal reading of Article 2 would have ruled out any form of belligerent occupation, thus rendering the 1949 Geneva Convention, which defines precisely how a belligerent occupation is to occur, entirely superfluous. Far from banning occupation altogether, the convention provides a whole array of prescriptions that require the occupying state to ensure the provision of food and access to civilians by relief agencies as well as a number of proscriptions, which prohibit forcible deportations, detention without trial, and destruction of property. The agreement has been signed by 189 countries, including the United States and Iraq. Significantly, the 1949 convention came into force after the UN Charter was ratified.

Under the convention’s terms, the United States has wide latitude to implement a number of positive reforms during the course of its occupation. Both the Geneva Convention and customary international law allow the United States and its coalition partners to carry out activities designed to eliminate all military and guerrilla opposition, ensure the safety of coalition troops and personnel, secure WMD stockpiles, carry out whatever other disarmament tasks they consider appropriate, and maintain law and order.

An occupying coalition force is not just permitted, but is obligated, to establish the orderly governance of Iraq. For this reason, the United States and other coalition countries arguably cannot delegate the responsibility for the postwar governance of Iraq to the UN or any other entity. The belliger-

**Both the Geneva Convention and customary international law allow military occupation.**

ent occupying powers have the ultimate responsibility and obligation to administer the country whose government they have just displaced, at least until a new national government vested with all attributes of sovereignty has been created. Although they can enlist the support of other countries, international organizations, and NGOs, the ultimate responsibility must remain with the belligerent occupying powers. In this regard, Article 43 of the Hague Conventions of 1907 imposes an affirmative obligation to administer a country following conquest and directly addresses the transfer of power, providing as follows: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>6</sup>

Meanwhile, the *U.S. Army Field Manual*—a single document containing the Hague Regulations, Geneva conventions, and other documents relating to customary international law, compiled by the U.S. Department of the Army in 1956—depicts this obligation as follows:

Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force.<sup>7</sup>

Under Article 55 of the 1949 Geneva Convention, the United States has a duty to provide food and medical supplies to the Iraqi population and, in cooperation with national and local authorities, to provide for their hygiene and public health, including maintaining the medical and hospital establishment. The convention also requires that the free exercise of religion in Iraq be permitted,<sup>8</sup> and that the occupying power undertake relief measures<sup>9</sup> and facilitate the proper workings of education systems for children.<sup>10</sup>

Thus, international law not only permits the military occupation of a defeated country in the form of the Hague Regulations and the Geneva conventions but also carefully and comprehensively orchestrates that occupation. To be sure, the documents do not set out the length of occupation but this matter clearly will very much depend on the ability and willingness of the next Iraqi administration to assume responsibility for running the country. The United States has stated its commitment to providing interim governance, which will be subject to the terms of the Geneva conventions, the Hague Regulations, and other terms contained in the *U.S. Army Field Manual*.

## Utilizing Indigenous Infrastructure and Resources

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Although military occupation laws oblige the occupying powers to ensure the public welfare of the civilian population, they would not need to carry that burden alone. The Geneva Convention's Article 51 allows the coalition forces to require that Iraqi workers carry out many or most of the government services, provided the services are primarily for the benefit of Iraqi civilians. In fact, given the sheer magnitude of this task, in a country of 22 million people, it would be impossible to deliver necessary services and keep the peace without the assistance of existing Iraqi institutions. These workers must be paid, of course, and their efforts must be directed only at the needs of the civilian population, but these limitations would not deter the use of Iraqi citizens.

The United States and coalition forces will have to sort out the various claims of those who hold private contract interests in the Iraqi economy, particularly in the oil industry. Article 43 of the Hague Regulations gives the occupying power the authority to establish courts. Undoubtedly, many foreign companies will claim an interest in redeveloping the petroleum industry; at the same time, the viability and long-term value of those claims even under Saddam's authoritarian regime were in some doubt.

Whether the occupying powers are obliged to recognize those claims in a post-Saddam Iraq should be determined by a tribunal established specifically for this purpose. Although such a tribunal can certainly be staffed by the coalition countries' personnel, given the political sensitivity of invalidating or even just reforming the various one-sided contracts that foreign companies signed with Saddam's pariah regime, it might be preferable to have Iraqi officials handle this task, with this particular function being one of those transferred quickly by the coalition occupation authorities to an Iraqi transition government.

To handle pre-military occupation legal issues that might come into play, particularly to ensure that all the senior officials of Saddam's regime are punished for war crimes and other offenses, the United States can and should rely on Iraqi courts to the maximum extent possible. This approach would underscore the U.S. commitment to and preference for national legal institutions as the best forum for handling the prosecution of international law offenses.<sup>11</sup> Using Iraqi courts for this purpose would also help mute the inevitable criticism in the Arab world if Iraqi officials were prosecuted directly by the United States. At the same time, to provide an appropriate fallback if Iraqi officials prove unwilling or unable to carry out their duties, the United States should consider obtaining the same rights to prosecute war criminals that the Japanese government ceded to General MacArthur.

Under the 1949 Geneva Convention Articles 64 and 66, the occupying powers would retain broad penal and law enforcement authority, subjecting Iraq's population to laws that are necessary to maintain an orderly government and guarantee the security of the occupation troops.

In any case, existing international law fully empowers the U.S. military to prosecute, through its courts martial and military commissions, those Iraqi officials who have committed war crimes and other offenses against the laws of war, including unlawful combatancy against U.S. troops from the period beginning with the Persian Gulf War in 1991 to the present.

The management of postwar Iraq is a daunting task, to say the least, but it need not be a significant economic drain on the U.S. economy. Under the 1907 Hague Regulations, occupying powers are lawfully entitled to take control of Iraq's sovereign assets and use them for all appropriate government purposes. The *U.S. Army Field Manual* notes that the costs to the occupied state's economy should not be more than it could reasonably be expected to bear.<sup>12</sup> Article 53 of the Hague Regulations states that

an occupying army can "only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations." In the case of Iraq, these resources are substantial.

Unspent Iraqi oil-for-food funds, currently held in various UN escrow accounts pursuant to Security Council resolutions (principally 661 [1990], 986 [1995], 1284 [1999], and 1409 [2002]), are clearly an Iraqi national asset that can be used for reconstruction. Indeed, the occupying powers would even be entitled to recoup all the costs associated with governing Iraq during the occupation. At the same time, the United States cannot use the occupation of Iraq as a profit-making operation because the concepts of private war, with the attending looting and pillaging, were rejected as long ago as the nineteenth century.<sup>13</sup>

Article 55 of the Hague Regulations supports the right of the occupying state to use the natural resources of the enemy state. The resources can be subject to normal use in the administration of a country but not depleted:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.<sup>14</sup>

**The ultimate responsibility must remain with the belligerent occupying powers.**

Building on this, Article 55 of the 1949 Geneva Convention permits the occupying power to requisition foodstuffs, articles, and medical supplies needed for use by the occupation forces and administrative personnel, provided that the needs of the civilian population have been taken into account. If not for the current restrictions on the sale of Iraqi oil, however, the country's economy could bear a significant portion, if not the entire portion, of that country's reconstruction and rebuilding costs. Indeed, the U.S. De-

**Postwar occupation forces should rely on existing Iraqi institutions as much as possible.**

partment of Energy estimates that Iraq possesses 112 billion barrels of oil and can produce about 2 million barrels per day,<sup>15</sup> but this production could increase by about 50 percent if current production hurdles were overcome. Concerning the UN sanctions-related resolutions, one can argue that those resolutions were predicated upon and could only be implemented within the context of a Saddam-led regime or a similar Iraqi government running that country. Under this approach, the

regime change effected by the coalition forces has effectively vitiated these resolutions and, although a new Security Council resolution confirming this fact would be helpful politically, it is not legally required.

There is a significant distinction between the use of natural resources to meet the occupying state's needs arising from the occupation and the acquisition to satisfy general military or civilian needs. This matter has a well-established litigation history, with the Singapore Oil Stock Case being the lead example.<sup>16</sup> During World War II, the Japanese occupation authorities seized oil stocks from Dutch owners. Upon Japan's defeat, the Dutch owners sued to recover their property, arguing that the title to the property never passed to Japan because the original Japanese confiscation was illegal. The War Damage Commission, convened to hear claims following the war, upheld the Dutch claims. It noted that, although stocks were indeed immovable property that could be taken by the Japanese, it was a violation of international law for Japan to have used oil for the "purpose of supplying the naval, military, and civilian needs of Japan," rather than using it for occupation costs.<sup>17</sup>

Another exercise of occupation authority to produce oil was vigorously contested when the Israelis, having taken control of the Sinai Desert during the Six-Day War, began drilling for oil. This oil was used both for occupation costs and for general revenue. The U.S. Department of State took the position that Israel could properly draw from already producing wells but could not engage in new exploration.<sup>18</sup> Israel took the position that the 1907 Hague Regulations only prohibited the wanton waste or destruction of an asset.<sup>19</sup> The resulting general consensus on the issue was that the use of ex-

isting wells to finance the costs of occupation is acceptable, but not to generate general revenue. With regard to Iraq, it appears that existing oil fields would provide enough oil for the foreseeable future, and therefore, the more difficult issue of whether an occupying state can engage in new exploration does not need to be answered.<sup>20</sup>

With the regime change in Iraq now complete, the United States faces a number of legal, diplomatic, and military imperatives, all of which would require it to create an effective interim governance structure. During the period of occupation, the U.S.-led coalition government would have the opportunity to address and propose ways to resolve the difficult set of governance, cultural, and religious issues related to the Kurds, Shi'ites, and Sunnis, as well as establish the proper balance between the national and local governing structures. The military government could also implement needed economic reforms, including measures to minimize corruption to ensure that Iraqi oil revenues directly benefit the country's people. A rapid improvement in the quality of life of the Iraqi population would be key to achieving long-term stability and acceptance of the reforms.

The occupation government must be able to cope with continuing security-related missions, such as the completion of Iraq's disarmament and possible combat against elements of the Iraqi military or paramilitary units that may continue to engage in intermittent resistance, as well as constructing new economic and political institutions capable of governing the country in the years to come. The ideal model is a military occupation regime, led by the United States and all the other countries that have joined the anti-Saddam coalition. The precise level of involvement would depend on the level of support provided by those countries and their interest in participating in the occupation regime. To the maximum extent possible, the postwar occupation forces should rely on existing Iraqi institutions and, when appropriate, should allow transition to self-government for well-pacified and well-reformed portions of Iraq. The legal and policy experiences amassed during the German and Japanese occupation, and the strictures of the 1907 Hague Regulations and the 1949 Geneva Convention, provide excellent context for a legal and efficient belligerent governance of Iraq. In turn, lessons to be drawn from the Iraqi post-Saddam governance experience will be instructive for future uses of a belligerent occupation model.

## **Winning the Peace Is the Issue**

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Upon examination of an entire range of criticisms and policy arguments used in the ongoing debate about military occupation to govern postwar Iraq, it is difficult not to conclude that the real dispute is not about military

occupation itself. Rather, it comes down to the more fundamental issues relating to the endgame in Iraq and, thus, the real debate is about the ends, not the means. To the extent that the means matter, it is undeniable that a military occupation model would allow the United States and its coalition partners maximum leverage and flexibility for dealing with difficult and potentially dangerous postwar challenges in Iraq.

**The real dispute is not about military occupation itself.**

There is also little doubt that, at the end of the day, the assessment of the U.S. role will be based largely if not exclusively on the political, economic, and security environment the coalition will be able to establish in post-Saddam Iraq. How the United States was able to achieve these results is not likely to be of much significance, provided, of course, that the United States acts lawfully.

Because military occupation remains fully compliant with the relevant norms of international law, the United States would be acting lawfully if it chooses to use this model for governing Iraq. Arguments to the contrary have no legal merit and are advanced by countries and organizations that have decided to use pseudolegalistic assertions to oppose and constrain the exercise of U.S. military power both in Iraq and elsewhere. The global community should pay these naysayers no heed.

## Notes

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1. Antony Shadid, "War's Aftermath Now Arabs' Focus," *Washington Post*, February 21, 2003, p. A1.
2. For an excellent discussion of Kosovo's reconstruction problems and the UN's role, see Stephen Schwartz, "U.N. Go Home," *Weekly Standard*, April 14, 2003, pp. 28–34.
3. See "Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany," April 1945, [www.usembassy.de/usa/etexts/ga3-450426.pdf](http://www.usembassy.de/usa/etexts/ga3-450426.pdf) (accessed April 17, 2003).
4. *Ibid.*
5. First Instrument of Surrender, September 2, 1945, [www.taiwandocuments.org/surrender01.htm](http://www.taiwandocuments.org/surrender01.htm) (accessed April 17, 2003).
6. Convention IV, Article 43, Respecting the Laws of Customs of War on Land, U.S.T.S. 539, October 18, 1907.
7. *U.S. Army Field Manual* (1956), 27–10, para. 358.
8. Geneva Convention, art. 55.
9. *Ibid.*, art. 60.
10. *Ibid.*, art. 50.

11. See Lee Casey and David Rivkin, "The National Justice," *Washington Times*, March 26, 2003, p. A23.
12. *U.S. Army Field Manual*, 27–10, art. 364.
13. The Lieber Code of 1863 was assembled by Francis Lieber at Abraham Lincoln's instruction as a code of conduct for Union troops during the Civil War.
14. Hague Regulations, art. 55.
15. Energy Information Administration, U.S. Department of Energy, "Iraq," in *EIA Country Analysis Briefs* (February 2003), [www.eia.doe.gov/emeu/cabs/iraq.html](http://www.eia.doe.gov/emeu/cabs/iraq.html) (accessed April 10, 2003).
16. *N.V. de Batafsche Petroleum Maatschappij and others v. The War Damage Commission*, Singapore Court of Appeal, *American Journal of International Law* 51 (1956): 802.
17. *Ibid.*, p. 803.
18. *Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and Gulf of Suez*, 16 I.L.M. 733 (1977).
19. *Ministry of Foreign Affairs Memorandum of Law on the Right to Develop New Fields in Sinai and the Gulf of Suez*, 17 I.L.M. 432 (1978).
20. See Dobie Langenkamp, "What Happens to the Oil: International Law and the Occupation of Iraq," January 17, 2003, [www.energy.uh.edu/documents/behind\\_the\\_gas\\_pump/DobieLangenkamp.pdf](http://www.energy.uh.edu/documents/behind_the_gas_pump/DobieLangenkamp.pdf) (accessed April 17, 2003).

